

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Ms Biyanka Manel Wathukara xxx
CASE NUMBER:	1815057
HOME AFFAIRS REFERENCE(S):	BCC2016/1234373
MEMBER:	Meena Sripathy
DATE:	5 March 2021
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa: • cl 820.211 of Schedule 2 to the Regulations • cl 820.221 of Schedule 2 to the Regulations.

Statement made on 05 March 2021 at 12:01pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – genuine and ongoing relationship – compelling reasons to waive Schedule 3 criteria – sponsorship limitation – joint bank account – knowledge of each other’s families – joint social activities – relationship motivated by a migration outcome – emotional and physical support to the sponsor – no period of unlawful residence – impact of COVID 19 travel restrictions – decision under review remitted

LEGISLATION

Migration Act 1958, ss 5, 65
Migration Regulations 1994, Schedule 2, cls 820.211, 820.221; Schedule 3; rr 1.03, 1.15, 1.20

CASES

Ally v MIAC [2008] FCAFC 49

Babicci v MIMIA (2005) 141 FCR 285
He v MIBP [2017] FCAFC 206
Jayasinghe v MIMA [2006] FCA 1700
MZYPZ v MIAC [2012] FCA 478
Re MILGEA and Dhillon [1990] FCA 144
Waensila v MIBP [2016] FCAFC 32

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
2. The applicant applied for the visa on 17 March 2016 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on 21 May 2018 on the basis that the visa applicant did not satisfy cl 820.211(2)(a) because the delegate was not satisfied the applicant and sponsor were in a genuine spouse relationship as that term is defined in s.5F of the Act at time of application. The delegate also found she did not meet the requirements of cl.820.211(2)(d)(ii) as she was not the holder of a substantive visa at time of application and does not meet Schedule 3 criterion 3001 and was not satisfied there are compelling reasons to waive the Schedule 3 requirements. The delegate also found the applicant does not meet cl. 820.221.
4. The applicant made an application for review of this decision to the Tribunal on 23 May 2018.
5. In November 2020 the applicant requested priority processing on the basis of the significant delay in processing of the application since it was lodged in 2016 and hardship due to separation of the applicant from her 14 year old son in Sri Lanka. On the basis of the circumstances of separation of a parent from a minor child, priority was granted on 20 November 2020 and the matter was then constituted to the Tribunal.
6. A hearing was initially arranged in person for 20 January 2021, but had to be postponed due to the circumstances of COVID 19 and a temporary local lockdown affecting the applicant's residential area. A new hearing was arranged for 2 March 2021.
7. The applicant appeared before the Tribunal on 2 March 2021 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor. The Tribunal hearing was conducted with the assistance of an interpreter in the Sinhala and English languages.
8. The issue in the present case is whether the applicant and sponsoring partner were and are in a genuine spouse relationship and, if so, whether the applicant meets Schedule 3 criteria or there are compelling reasons for not applying those requirements.
9. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

10. Information in the application forms indicates the applicant is a 52 year old Sri Lankan national. She is sponsored by Sellapperumarage Ranjana Lal Fernando, who is a 57 year old Sri Lankan born Australian citizen. The sponsor was previously married and provides information that he sponsored both his previous partners for visas in 1996 and 2007. The

applicant was previously married from 1998 to 2010 and had one child of this marriage. The parties indicate they met on 12 August 2015, committed to a shared life together in September and married on 30 December 2015. The applicant has a mother, two siblings and a son (born in 2006) residing in Sri Lanka. It is indicated the sponsor has parents and one sibling residing in Sri Lanka and four adult children (born between 1987 and 1999), three of whom reside in Australia and one in Sri Lanka.

11. On 16 April 2018 the Department invited the applicant to provide submissions addressing Schedule 3 criteria 3001 or whether there are compelling reasons not to apply these criteria and to provide further evidence in support of her relationship with the sponsor.
12. On 20 April 2018 the applicant responded with a submission from her representative and supporting documents. It was submitted that the sponsor was sick at the time she lodged her visa application and she was unable to return to Sri Lanka at that time due to his circumstances. It was also submitted that she was unaware at that time that she did not hold a substantive visa and 'did not disclose the humanitarian visa application she made'.
13. The following evidence in support of the relationship was provided to the Department:
 - A Statutory Declaration dated 20 April 2018 from the applicant;
 - photos of the couple;
 - Joint electricity bill for period from 9 February 2018
 - Joint bank statement for period from January to March 2018 (referred to in delegate's decision record but not provided to Tribunal in BCC2016/1234373)
 - Handwritten Residential Tenancy Agreement commencing 7 October 2016 without an end date.
14. On 21 May 2018 the delegate refused the application, having considered the evidence provided. The delegate was not satisfied the applicant and sponsor were in a genuine spouse relationship at time of application and time of decision, or that there were compelling reasons for not applying the Schedule 3 criteria.
15. Before the Tribunal the applicant provided a bundle of evidence, delivered by hand to the Tribunal on 29 November 2019, including NAB bank statements for the joint account for periods from July 2016 to date; tenancy agreements in their joint names for periods from December 2015 to date; correspondence addressed to each of them at the same address; sponsor's tax returns showing declaration of applicant as spouse; sponsor's superannuation account (claiming that applicant is nominated sole beneficiary- this however is not indicated on the documents provided); support letters from 5 friends and community members; evidence of money transfers to applicant's brother for expenses of her son; evidence of sponsor's trip to Sri Lanka to visit applicant's ill mother who subsequently passed away.
16. On 11 January 2021 the applicant provided further supporting documents including photos of Christmas and New Years celebrations; rental and utility bills, applicant's CBA statements evidencing expenses for groceries and updated joint NAB bank statements.
17. *Tribunal hearing 2 March 2021*
18. At the outset the Tribunal informed the applicant about the existence of a certificate under s376 of the Act, which had the effect of prohibiting the Tribunal from disclosing certain documents on the Department file, on the basis of public interest. It explained that it had a

discretion to disclose the information if it considered it appropriate to do so. The Tribunal indicated to the applicant that as a matter of procedural fairness, before the end of the hearing, it would inform her of the substance of the information and invited her comments. The applicant made no further comments about the existence of the non disclosure certificate.

19. The applicant gave evidence about her current living, work and family circumstances and the inception and development of the relationship. Following her evidence, the Tribunal took evidence from the sponsor about similar matters. Their evidence was given in a direct, spontaneous and forthright manner and substantially consistent, and the Tribunal found them to be generally credible witnesses. A summary of relevant evidence provided follows.
20. She lives with the sponsor at an address in Berala, with two other tenants. Prior to this they lived at three other addresses, all in Auburn, the last two with other tenants. The sponsor's evidence about their living arrangements was consistent.
21. She gave evidence about her family members overseas, including her sister and brother and son. Her son lives at a hostel while studying and with her sister during holidays. Her mother passed away in 2018, and her father passed away many years ago in 2005. She said the father of her son is not involved in his life. The marriage deteriorated when she was pregnant with their son. They had been married for some 8 years before they had their son. After the birth of the child he came and went for a few years and eventually left permanently. He never provided for her or her son. He initiated the divorce they eventually had. She has no contact with him but heard that he may have remarried. He has no contact with her son. The sponsor has suggested to her that in future they should take the son to see his father, but to date this has not occurred. The applicant has no family in Australia. The sponsor, in his evidence, said he understood she divorced her former husband after 10 years of marriage. He met the applicant's son in his first visit to Sri Lanka in May 2018 and has seen and spent time with him during each subsequent visit. He has formed a connection with him as the boy attends the same school he attended as a child and also has a love of cricket. The child has stayed with him during his visits with his family and he has taken him on trips. The sponsor said the child recently attended his sister's son's birthday celebration, and showed the Tribunal a photo of this on his mobile phone, along with other photos of members of the applicant's family with him in Sri Lanka.
22. The Tribunal asked the applicant about her knowledge of the sponsor's family. She said his father died in January 2019. He has a mother and one sister who live in Moratuwa. He has three children in Australia, 2 daughters and one son. She has not met the daughters, and only briefly met the son and his former wife once at the temple. The sponsor, in his evidence confirmed she has not met his daughters but said he introduced his ex wife and son to the applicant at Westfields in Parramatta around December 2015. The sponsor offered no explanation for why he has no relationship with his children since marrying the applicant. He indicated that he has tried to contact them but they refuse to respond. Both parties confirmed that the sponsor has only these 3 children. When asked about the 4th son referred to in the application, they said this was the son of the sponsor's second wife. They came to Australia but later returned to Sri Lanka. The applicant told the Tribunal she does not know why the sponsor's past relationships ended. She has not really asked him, because she doesn't think she needs to know.
23. The Tribunal questioned the parties about the financial, social, household and commitment aspects of the relationship. Details of the evidence provided is included in the discussion below.

24. The applicant made available two witnesses to give evidence in support of the relationship at the hearing, one by telephone and one in person. The Tribunal decided not to take oral evidence from them and invited her to provide written statements for consideration.
25. Prior to the end of the applicant's evidence, the Tribunal put to her that a number of allegations had been received by the Department, subject of the certificate referred to above, suggesting the relationship with the sponsor was contrived to obtain a visa and was not genuine and that he had received payment for sponsoring her. There was also a suggestion that the applicant had a same sex partner. The Tribunal noted that certain of the allegations were anonymous and there was no evidence provided to support them and it would not be placing any weight on this information for those reasons. Her comments or response were invited. In response she said that she found a caring and good man in her husband and just wants to stay here to provide for her family, bring her son here, buy a house and live a good life. After she divorced her first husband she has had no other partner until now.
26. Following the hearing the following further evidence was submitted:
- Statement from Prasanna Kariyawasam, founding member of Sri Lanka Lions Sports Club, who knows the sponsor in that context since 1993 and attests to his knowledge of the relationship and states his opinion that it is a genuine relationship based on observations of the applicant and sponsor together since 2016
 - Statement from Don Perakum Wellappuli Arachchige, President of Sinhala Association of Australia, who knows the sponsor in that context and attests to having introduced the applicant and sponsor to each other, attended their marriage and states his opinion that it is a genuine relationship based on observations of the applicant and sponsor together when socialising on numerous occasions.
 - Annotated photos showing the sponsor with members of the applicant's close family in Sri Lanka, including her son, brother and sister and their families and their attendances at various special occasions including birthday celebrations, weddings and the funeral of the sponsor's father.

27. FINDINGS AND CONSIDERATION

28. For the following reasons, having carefully considered all of the evidence before the Department and Tribunal, including the substantial amount of additional documentary evidence provided to the Tribunal since lodgement of the review in 2018, the passage of time since then and the oral evidence of the applicant and sponsor at the hearing, the Tribunal is satisfied the applicant and sponsor are in a genuine spouse relationship as at the time of its decision. Although as discussed further below, it had some initial concerns about the circumstances surrounding the inception of the relationship, taking into consideration the substantial evidence provided since that time, the Tribunal is satisfied that the evidence also supports a finding that they were in a genuine spouse relationship at time of application on the basis that the weight of evidence now before it tends logically to support this conclusion.¹
29. The Tribunal's assessment of evidence and reasons for these conclusions follow.

¹*Ally v MIAC* [2008] FCAFC 49 at [32]–[35]; *Jayasinghe v MIMA* [2006] FCA 1700 at [35], citing *MIEA v Pochi* (1980) 4 ALD 139 at [24] per Deane J which held that evidence of subsequent events may be taken into account if it 'tends to logically show the existence or non-existence of' the relationship at that particular time'.

Whether the parties are in a spouse or de facto relationship

30. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
31. 'Spouse' is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in reg 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in reg 1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

32. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The Tribunal accepts the applicant and sponsor are both validly divorced from their previous spouses, are over the age of 18 years and there is no other impediment to marriage. They married on 30 December 2015 at Merrylands, NSW. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s 5F(2)(a).

Are the other requirements for a spouse relationship met?

33. The Tribunal has considered the documentary and oral evidence relating to the circumstances of the relationship and makes the findings below addressing matters referred to in r.1.15A(3).

34. *Financial aspects of the relationship*

35. The applicant and sponsor gave evidence that they have a joint bank account, and also use and maintain their separate personal accounts. Evidence of statements of these various accounts are before the Tribunal. Their oral evidence was that they have both been working consistently since the marriage and their respective wages are paid into their personal accounts. The sponsor is mostly responsible for payment of rent and utilities from money from his account. The applicant contributes some amount towards rent depending on her income and they have also consistently taken on additional paid tenants to help with the rental payments. The applicant is mostly responsible for paying for groceries. They each deposit into the joint account to accumulate savings, and are saving for a deposit for a property in the future. They have as yet no joint assets or joint liabilities. They gave consistent evidence that when they started living together, the sponsor had many household items already. They have purchased some items including a fridge and TV over the years. When asked if either had any loans, the applicant indicated knowledge of a past loan the sponsor had but she understood it was now paid off. The sponsor confirmed this, though both appeared to have no knowledge of an ongoing regular withdrawal coming out of the sponsor's account.

36. Having considered the applicant and sponsor's oral evidence and the documentation provided in support, the Tribunal is satisfied their evidence is substantially consistent with each other, supported by the documents and consistent with the existence of a genuine and ongoing spouse relationship.

37. *Nature of the household*

38. The evidence is that applicant and sponsor are living together and have lived together prior to the current address at three previous addresses. They gave a consistent account of their address history, and documentary evidence of the lease arrangements is before the Tribunal. They also have lived with other tenants at each of these addresses, to assist with the rental payments. They gave evidence of each other's daily routines, and workplaces and hours. Their evidence of the housework routine was also generally consistent. Both said the applicant does most of the cooking and the sponsor helps with laundry and cleaning, and occasionally cooks. She prepares his lunch on a daily basis including an extra lunch for his boss every Monday, which she does as a cultural tradition in memory of her late mother. Both said they each drive to work. The applicant's son lives in Sri Lanka and attends a hostel during school terms. The sponsor has met and was familiar with her son's circumstances. He told the Tribunal he attended the same school as the child and shares an interest in cricket with him. The child has stayed with his family during his visits to Sri Lanka, and attends family events of his family members. Photos provided following the hearing supports this. The sponsor indicated he has formed a close parental relationship with the child and supports the applicant to care for and be responsible for him. The evidence before the Tribunal is that the applicant has no relationship with the sponsor's adult children in Australia and has never met his daughters. Both gave evidence that the sponsor is also estranged from them, though no explanation was offered for this situation. The sponsor confirmed they did not attend his daughter's wedding last year. Despite the absence of any real explanation for the estrangement between the sponsor and his children, the Tribunal accepts that nothing arises from their evidence on this matter that raises particular concerns as to the genuineness of their relationship and their evidence about it was substantially consistent. It accepts that hostility, or lack of support, from children of previous relationships to a parent's new relationship is not, of itself, inconsistent with the genuineness of the relationship.

39. Having considered the evidence of the nature of the household, the Tribunal is satisfied the applicant and sponsor are residing together as a couple, and that the sponsor has met and formed a step-parental relationship with the applicant's minor son in Sri Lanka, and there is sufficient evidence of the nature of the household that is consistent with a genuine partner relationship of this duration.

40. *Social aspects of the relationship*

41. As indicated above, the sponsor has met and formed a relationship with the applicant's son. The evidence also supports that the sponsor has met and is accepted by the applicant's extended family members in Sri Lanka. The sponsor met the applicant's mother in 2018 when she was ill prior to her passing. They each gave consistent evidence that their extended families attended the funerals of the applicant's mother and sponsor's father in 2018 and 2019, and family members are invited to and attend significant family functions. Photos were provided following the hearing to support this. The Tribunal finds that their relationship is recognised and accepted by their respective parents and siblings. Numerous statements of support from friends were provided to the Department and Tribunal. Two of these friends were available to give oral evidence to the Tribunal, which was not considered necessary. The Tribunal accepts their written statements provided after the hearing. There is evidence that the parties declare each other to the ATO in their tax returns. The applicant submits she has named the sponsor as her beneficiary for superannuation. They gave oral

evidence that they socialise together at dinners and with friends, and the applicant cooks for his cricket club and attends games. They travelled to Melbourne for a mutual friend's wedding in March 2020. The photo evidence submitted supports these claims.

42. The Tribunal is satisfied on the evidence that the social aspects of the relationship is consistent with a genuine partner relationship.

43. *Nature of persons' commitment to each other*

44. The applicant met the sponsor in August 2015, not long after she arrived in Australia on a Temporary work visa, purportedly to attend the World Cup Netball competition and associated umpire & coaching seminars. When pressed by the Tribunal as to her plan when she came here, she agreed that she did not intend to return as she had problems in Sri Lanka relating to her ex husband. The Tribunal noted that her evidence about this contradicted her own earlier evidence about the timing and circumstances of the end of her previous marriage. It notes she lodged a change of status visa application before her visa expired, indicating that she had no intention of leaving. Meanwhile she began seeing the sponsor more regularly and in December they decided to marry. The applicant told the Tribunal their relationship developed as she offered to help him with his back pain and low mood issues at that time. The sponsor, gave somewhat contradictory evidence about why and how the relationship progressed saying he introduced her to his ex wife, telling her the applicant was looking for someone to marry to stay here, and when his wife suggested he marry her, he decided to do that. In any event, they married on 30 December 2015 and the applicant subsequently lodged this application in March 2016 and withdrew her other application.
45. The evidence and circumstances of the inception and commencement of the relationship, strongly suggests to the Tribunal that it was entered into for the purposes of securing a migration outcome for the applicant. According to judicial authorities, this of itself is not a reason to conclude there is not a mutual commitment to shared life as a married couple or the relationship is not genuine, as it is recognised that people enter into marriages with a variety of purposes and motives. The case law makes clear that it is not necessarily inconsistent with a genuine marriage relationship that it was entered into by one or both parties with a view to material benefit or advancement, as for example with the hope of becoming eligible to reside in a particular country.² What is relevant for the Tribunal's assessment is whether the parties' intentions or motives are consistent with having a mutual commitment to a shared life. In this regard the Tribunal has considered the evidence of the continuation of the relationship since it commenced with their marriage on 30 December 2015 to date. They have lived together since then at four addresses, and their oral and documentary evidence supports that they live together as a couple, have become integrated in each other's extended families, socialise together and have made significant plans for the future together. Having regard to all the evidence the Tribunal is satisfied that while the applicant may have commenced the relationship motivated by a migration outcome, they have, in the prolonged period of processing the application since then, a mutual commitment to a shared life as a couple and a genuine and continuing relationship, in the sense of one that is enduring for a period into the reasonably foreseeable future.
46. Therefore, while the Tribunal had some concerns about the inception and motivations of the relationship at its outset, it is satisfied, having considered all of the evidence now before it, and in particular having had the opportunity to question the applicant and sponsor at some length and in detail at a hearing conducted over three hours. The Tribunal found their oral evidence was candid, frank and spontaneous, and on this basis together with the supporting documentary material, is satisfied that the relationship is genuine and ongoing.

²Re MILGEA and Dhillon [1990] FCA 144, citing with approval Street CJ in *R v Cahill* (1978) 2 NSWLR 453 at 458, also referred to as still relevant in *Garcevic v MIAC* [2012] FMCA 931 at [34].

47. On the basis of the findings and conclusions above, the Tribunal is satisfied the applicant and sponsor have a mutual commitment to shared life to the exclusion of others; the relationship is genuine and continuing ; and they live together and therefore the applicant meets the requirements of s5F(b)-(d) of the Act at the time the visa application was made and the time of this decision.
48. Therefore the applicant meets cl 820.211(2)(a) and.820.221(1)(a).

Does the applicant meet Schedule 3 criteria, or should those criteria be waived?

49. An applicant who is not the holder of a substantive visa at the time of application must meet certain criteria in Schedule 3 to the Regulations. With limited exceptions not relevant to this case, he or she must satisfy Schedule 3 criteria 3001, 3003, and 3004 unless the Minister is satisfied that there are compelling reasons for not applying those criteria: cl.820.211(2)(d).
50. It is not in dispute that the applicant in the present case did not have a substantive visa at the time of application. As the applicant did not enter Australia as the holder of a Subclass 995 visa or special purpose visa, the issue in the present case is whether the applicant satisfies the Schedule 3 criteria unless there are compelling reasons for not applying those criteria. These criteria are set out in the attachment to this decision.

Criterion 3001

51. In order to satisfy criterion 3001, the application for the visa must have been lodged within 28 days of the relevant day. The 'relevant day' is defined in 3001(2), as set out in the attachment to this decision.
52. In the present case, the last substantive visa the applicant held was a Temporary Work (Subclass 400) visa which was valid until 5 November 2015. The 'relevant day' therefore was 5 November 2015. She applied for the present visa on 17 March 2016.
53. As the visa application was not made within 28 days of the relevant day, the applicant does not satisfy criterion 3001.

Compelling reasons

54. As the Tribunal has found that the applicant does not meet the relevant Schedule 3 criteria, it is required to consider whether there are compelling reasons for not applying the criteria.
55. The expression 'compelling reasons' is not defined for these purposes. However, the reasons should be sufficiently convincing to move the decision-maker to exercise its discretion to waive the requisite criteria and the circumstances must be sufficiently powerful to lead a decision-maker to make a positive finding in favour of waiving the required criteria: *MZYPZ v MIAC* [2012] FCA 478 at [10]; *Babicci v MIMIA* (2005) 141 FCR 285 at [24]. Circumstances which constitute 'compelling reasons' for not applying the Schedule 3 criteria can arise at any time, including after the visa application is made: *Waensila v MIBP* [2016] FCAFC 32.
56. Before the Department the compelling reasons put forward on behalf of the applicant were that the sponsor "was sick and under depression" and the applicant could not return due to his circumstances and that he needed her mental and physical support at that time. It was also submitted that the applicant believed she still had a substantive visa. No evidence of the sponsor's health was provided with the submissions.

57. The Tribunal asked the applicant at hearing what she wants the Tribunal to consider as compelling circumstances now, given that it must take into account circumstances up until the decision is made. It also noted that since the delegate's refusal decision in May 2018, it was open to her to consider returning to Sri Lanka and lodging an offshore application and asked why she did not consider that. The applicant repeated the claim that the sponsor was sick and that was why she lodged the application here because he needed her help and care. Regarding why she did not return after the application was refused she said that she was never advised that she could or should do that. She just followed the advice of her agent who told her to lodge an appeal to the Tribunal. The Tribunal noted that her evidence about the sponsor's circumstances given to the Tribunal, particularly that he has worked consistently since marriage and plays cricket regularly, does not support that he is or was as 'sick' and needing of her care as she claims. The sponsor in his response said although he plays cricket he has many pains. Both the applicant and sponsor indicated that they have since discussed the matter and if the applicant has to return to Sri Lanka, the sponsor will apply for dual citizenship and accompany her because they do not want to be separated.
58. The Tribunal has considered the reasons raised by the applicant to the Department and Tribunal. It is not satisfied the evidence before it supports that the sponsor's physical or mental health circumstances are, or were at time of application, sufficiently grave as to require the applicant's support or assistance either at time of application or any time since then. It does not accept this is a compelling reason to waive the Schedule 3 criteria.
59. The Tribunal has considered other circumstances that arise on the material before it, though not specifically raised by the applicant as compelling reasons. Firstly, the relationship between the applicant and the sponsor has now been ongoing for over five years, which is considered under Migration Regulations to be a long term partner relationship (defined in r.1.03 as 'as not less than 3 years'). While it clearly has always been possible for the applicant to depart Australia and lodge a fresh application offshore, she claims she was never advised about this, and in any event she clearly has not done this. Five years has passed, and the Tribunal finds that refusing the visa on this basis now and requiring her to restart the process afresh would lead to unnecessary and undue hardship, not mentioning the additional financial pressures involved in making a new application. Secondly, the applicant has a 14 year old child in Sri Lanka who she and the sponsor intend to bring to Australia once she is granted a visa. Refusal of the visa on this basis to require her to start a fresh process offshore will further delay this process and impact on him. Thirdly, the circumstances of COVID 19 means there are currently travel restrictions which would affect the sponsor's plans of accompanying the applicant if she was required to return, and the circumstances of COVID 19 is also likely to affect the processing of any future application.
60. The Tribunal has considered the circumstances that resulted in the applicant becoming unlawful and the period of unlawfulness, which are referred to as relevant matters in Departmental policy (not binding on, but relevant for the Tribunal's consideration). The applicant lodged another visa application while she still held her substantive visa, which she then withdrew when she made this application. In the absence of any evidence before the Tribunal about that earlier application, the Tribunal observes the Schedule 3 criteria 3001 was not met only because the application was lodged more than 28 days since her last substantive visa and not because she became unlawful. It finds the applicant has in fact not had any period of unlawfulness since arrival in Australia.
61. Considering all of the above circumstances individually and cumulatively, and the underlying purpose of the provision when it was introduced, being recognition of the hardship that may result requiring an unlawful non citizen to leave Australia and apply offshore³ the Tribunal finds the duration of the relationship, together with the impact on her 14 year old son in Sri

³ Explanatory Statement to Statutory Rules 1996, No 75.

Lanka, whom the applicant and sponsor want to bring over to Australia without further delay together with the circumstances and impact of the COVID 19 pandemic leading to uncertainty for the sponsor to travel and unpredictability of future processing of an offshore application, amount to compelling reasons for not applying the Schedule 3 criteria.

62. Accordingly, the applicant meets cl.820.211(2)(d)(ii).

63. Sponsorship limitation

64. The Tribunal looked at Departmental records relating to the sponsor's previous partners to consider whether the sponsorship limitation provisions in Regulation 1.20J apply in this matter. The records confirm that he sponsored his second wife for a Partner visa in 2009, which was granted in 2010. His first wife was included in his application for permanent residence made in 2003 and was not the subject of a sponsorship.

65. Therefore, as he has not sponsored more than two persons who were granted Partner visas, and a period of more than 5 years has passed since the last application, r.1.20J does not limit the sponsorship in this matter.

66. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

67. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:

- cl 820.211 of Schedule 2 to the Regulations
- cl 820.221 of Schedule 2 to the Regulations

Meena Sripathy
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

(1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).